In the

Supreme Court of Virginia

At Richmond

Record No. 121534

PKO VENTURES, LLC

Appellant,

– v. –

NORFOLK REDEVELOPMENT HOUSING AUTHORITY,

Appellee.

BRIEF OF APPELLEE

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SUMMARY

This case involves the acquisition of property owned by PKO Ventures, LLC ("PKO") pursuant to the Hampton Boulevard Redevelopment Plan (the "Redevelopment Plan" or "Plan") created and implemented by the Norfolk Redevelopment and Housing Authority (the "Authority"). The Authority's right to acquire the property arose when the Plan was adopted in 1998, nine years before the enactment of Virginia Code § 1-219.1. This new statute, which eliminates the Authority's ability to acquire blighted areas, has no effect on the Authority's acquisition of PKO's property.

In 1999 and again in 2009, the Norfolk Circuit Court (the "Trial Court") held that the Plan and acquisitions under the Plan were lawful. In this case, the Trial Court applied the holdings in those cases pursuant to *stare decisis* to deny PKOs defenses and objections to acquisition. As the Redevelopment Plan affects over 150 properties within the Project Area, this is exactly the kind of situation in which *stare decisis* ensures consistent outcomes for parties subject to substantially similar facts.

STATEMENT OF THE CASE

On April 21, 2010, the Authority filed its petition to acquire PKO's property in furtherance of the Redevelopment Plan. PKO objected to the

condemnation based on the lawfulness of the adoption of the Redevelopment Plan and the application of Virginia Code § 1-219.1.

After consolidating this case with four other cases involving properties within the same project area (the "Project Area"), the Trial Court found that the facts in the consolidated cases are substantially the same as two previous sets of cases relating to the same Redevelopment Plan and the same Project Area: *Norfolk Redevelopment and Housing Authority v. Arney*, *et al.* (the "2009 Cases"), and *Norfolk Redevelopment and Housing Authority v. J.A.G. Associates, et al.* (the "1999 Cases").

In the previous cases, the Trial Court found that the Redevelopment Plan was lawfully adopted and that the use of eminent domain to acquire properties within the Project Area was also lawful. The Trial Court here applied the doctrine of *stare decisis* and overruled PKO's objections and defenses based on the lawfulness of the plan. Additionally, the Trial Court found that Virginia Code § 1-219.1, which went into effect on July 1, 2010 and requires that all property taken for the elimination of blight must be blighted itself, does not operate to discontinue this condemnation proceeding.

The consolidated cases were scheduled for separate trials on the issue of just compensation. At the trial held on July 12 and 13, 2012, jurors

awarded PKO $550,000 as just compensation for the Subject Property. The final Order Confirming Report of Jurors in this case was entered on August 13, 2012. PKO appealed.

STATEMENT OF THE FACTS

The Authority is a political subdivision of the Commonwealth of Virginia, duly organized, created and existing under the Housing Authorities Law, Title 36, §§ 36-1 *et seq.* of the Code of Virginia. The Authority is empowered by law to acquire property by eminent domain for statutorily authorized purposes. *See* VA. CODE § 36-27.

The Redevelopment Plan was created to eradicate blight and revitalize the Project Area located on the east side of Hampton Boulevard in the City of Norfolk, near Old Dominion University. Appx. 85-88 (Plan, pp. 30-32). The Redevelopment Plan sets forth the public use and purpose of the Authority's exercise of eminent domain in the Project Area. Appx. 79-86. The Subject Property is located within the Project Area. Appx. 106.

In creating and adopting the Redevelopment Plan, the Authority conducted an extensive study of the Project Area and found it to be blighted. Appx. 59-78 (Redevelopment Plan, pp. 6-23). The Authority conducted an inspection of deteriorated building structures, evaluated the condition of the property surrounding the buildings and surveyed the entire

area. *Id.* The Authority found high levels of poverty, incompatible land uses, problematic environmental conditions, poor public infrastructure, inadequate curbing, guttering, and sidewalks, insufficient street lighting, decline in the number of homeowners, and higher than average crime rates. *Id.*

The Authority also solicited the input of numerous local entities, including the City of Norfolk, the Norfolk Planning Commission, Old Dominion University and the Old Dominion University Real Estate Foundation. The Authority worked in conjunction with these entities to comprehensively redevelop the Project Area to eradicate blight and prevent its recurrence. Appx. 96. ODU and the Foundation provide funds necessary for acquisition of the property and the Authority conveys the property to these entities to be redeveloped in conformity with the Redevelopment Plan. As part of this process, ODU and/or the Foundation pay to the Authority 4% of the cost of acquisition to reimburse the Authority for its administrative costs in administering the Redevelopment Plan. Appx. 263.

In 1999 and again in 2009, landowners challenged the lawfulness of the Redevelopment Plan and acquisitions of their properties under the Plan. Appx. 120-151; 152-168. These challenges failed, as the court held

in both sets of cases that the Redevelopment Plan and acquisitions under the Plan were lawful. Appx. 168-171 (Order dated November 18, 1999 overruling objections and defenses); Appx. 172-207 (*Norfolk Redevelopment & Housing Authority v. Arney, et. al.,* No. 08-1918, Letter Opinion (Norfolk Cir. Ct. July 23, 2009) ("July 23, 2009 Letter Opinion") and Orders dated October 22, 2009 and January 12, 2010 overruling objections and defenses). PKO has made the same challenges in this case. Appx. 23-28.

In 2007, the General Assembly passed § 1-219.1. Among other things, § 1-219.1 requires that any property taken for the purpose of eradicating blight must be blighted itself. VA. CODE § 1-219.1. As part of this act, the General Assembly provided that the new law would have a delayed effective date as it pertained to acquisitions of property by a redevelopment and housing authority under a redevelopment or conservation plan adopted prior to January 1, 2007. *Id.*, clause 3 ("Clause 3"). In addition to its challenges to the Redevelopment Plan, PKO argued that § 1-219.1 should be applied to discontinue this proceeding.

On February 17, 2011, the Trial Court issued a letter opinion denying PKO's objections and defenses to the acquisition of its property. Appx. 436-445. The Trial Court ruled that the law in effect on the day the petition

was filed is the law that controls this proceeding, and that the retroactive application of Virginia Code § 1-219.1 to discontinue this case would be in violation of Virginia Code §§ 1-9 and 1-239. *Id.* at 441-444. The Trial Court also held that the Redevelopment Plan was lawful, applying the results of the 1999 and 2009 Cases to this case by virtue of *stare decisis*. *Id.* at 439-441.

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITY

I. THE TRIAL COURT CORRECTLY HELD THAT VIRGINIA CODE § 1-219.1 DOES NOT DISCONTINUE THIS CONDEMNATION PROCEEDING. (Assignment of Error 1).

Standard of Review

This Court reviews *de novo* the Trial Court's interpretation of legislation. *See Laws v. McIlroy,* 283 Va. 594, 598, 724 S.E.2d 699, 702 (2012).

Discussion

In 2007, the General Assembly enacted Virginia Code § 1-219.1, which requires that all property taken for the eradication of blight must itself be blighted. By contrast, the prior law, embodied in § 36-49(1), permitted acquisition of all property in a blighted area, regardless of the condition of individual parcels.

The General Assembly also established the statute's effective date as follows:

> Until July 1, 2010 the provisions of this act shall not affect the ability of a redevelopment and housing authority . . . to acquire property pursuant to any redevelopment or conservation plan adopted prior to January 1, 2007.

2007 Va. Acts Ch. 926, cl. 3.

This Authority's right to acquire PKO's property arose in 1998 with the adoption of the Redevelopment Plan. This condemnation proceeding was filed on April 21, 2010. Both of these events occurred before § 1-219.1 took effect. For the reasons explained below, the new statute does not operate to discontinue this condemnation proceeding.

A. The Authority has a substantive right to acquire PKO's property which cannot be impaired by retroactive application of § 1-219.1.

1. The Authority's substantive right to acquire PKO's property arises from Title 36 of the Virginia Code.

Title 36 of the Virginia Code and, specifically, §§ 36-48, -49 and -51, envisions a comprehensive redevelopment of blighted areas by empowering the Authority to acquire and redevelop all property in the project area, whether blighted or not. The purpose of the Redevelopment Plan is to redevelop the entire project area in a manner that will prevent the recurrence of the blighted conditions. This involves two steps, both of

which are vital to a project's success. First, the Authority acquires and clears all property within a blighted area, by negotiation if possible and by eminent domain if necessary. Second, the Authority redevelops the area in a comprehensive manner to ensure that the blighting influences do not return. Both steps are a vital part of the Authority's mission and a substantive right provided by statute. VA. CODE, §§ 36-49(1) and -51; *Hunter v. Norfolk Redevelopment and Housing Authority*, 195 Va. 326, 336, 78 S.E.2d 893, 899 (1953) (primary purpose of takings under redevelopment plans is the eradication of blighted areas and adaptation of such areas to uses that will preclude a recurrence of blight).

Upon the adoption of the Redevelopment Plan in 1998, the Authority was empowered to acquire all of the properties within the project area set forth in the Plan, including PKO's property. VA. CODE, § 36-49(1).

Thus, as a result of the adoption of the Plan, the Authority's right to acquire PKO's property arose in 1998, well before the enactment of § 1-219.1 in 2007 and well before its effective date of July 1, 2010.

2. The Authority's substantive right to acquire PKO's property may not be impaired by applying § 1-219.1 retroactively.

This Court has held consistently that once a substantive right accrues, it may not be impaired by enactment of new laws.

In *City of Norfolk v. Kohler,* 234 Va. 341, 362 S.E.2d 894 (1987), a librarian who was an assistant department head was, by virtue of this position, a classified employee of the city. Classified employees could be fired only for just cause following a hearing. The General Assembly subsequently amended the city's charter to provide that assistant department heads would not be included in classified service. *Id.*, 234 Va. at 344, 362 S.E.2d at 895. The city then fired the librarian without cause or hearing. The Supreme Court held that the librarian had a substantive right to be fired only for just cause after a hearing and that this right could not be impaired by a retroactive application of the change in the city's charter. *Id.*, 234 Va. at 345, 362 S.E.2d at 896.

This Court has applied this rule in many different contexts. *See, e.g., Chappell v. Perkins*, 266 Va. 413, 419, 587 S.E.2d 584, 587 (2003) (change in law pertaining to interest of surviving spouse in estate may not be applied retroactively to impair spouse's rights that accrued prior to the change); *Adams v. Alliant Techsystems, Inc.*, 261 Va. 594, 599, 544 S.E.2d 354, 356 (2001) (change in Workers' Compensation Act to include hearing loss as compensable under Act could not be applied retroactively to impair plaintiff's right to pursue common law cause of action that accrued before change); *Dale v. City of Newport News*, 243 Va. 48, 51, 412 S.E.2d 701,

702 (1992) (newly enacted cap on city's uninsured motorist insurance coverage could not be applied to a personal injury claim that accrued before the cap was enacted); *Shiflet v. Eller*, 228 Va. 115, 121, 319 S.E.2d 750, 754 (1984) (right of contribution accruing to defendant upon plaintiff's injury could not be impaired by new law enacted after injury); *Potomac Hospital Corp. v. Dillon*, 229 Va. 355, 360-61, 329 S.E.2d 41, 44-45 (1985) (same relevant facts and result as *Shiflet*); *Gloucester Realty Corp. v. Guthrie,* 182 Va. 869, 873-875, 30 S.E.2d 686, 688-689 (1944) (contract rights are protected from retroactive application of new statute); *Allen v. Mottley Const. Co.,* 160 Va. 875, 881, 170 S.E. 412, 414 (1933) (retrospective application of laws is not favored and may not impair vested rights).

Section 1-219.1 also cannot be applied retroactively because there is no language in the statute manifesting an intention by the General Assembly that it be so applied. *Guthrie,* 182 Va. at 873, 30 S.E.2d at 688 ("'failure to express an intention to make a statute retroactive evidence[s] a lack of such intention.'") (quoting *Ferguson v. Ferguson,* 169 Va. 77, 87, 192 S.E. 774, 777 (1937)); *Kennedy Coal Corp.* v. *Buckhorn Coal Corp.,* 140 Va. 37, 56, 124 S.E. 482, 488 (1924) (statutes are not to be applied retroactively unless it is "*beyond doubt* that the legislature meant it to

operate retrospectively") (*quoting Crigler's Committee v. Alexander's Executor*, 33 Gratt. (74 Va.) 674, 677 (1880) (emphasis added).

The Authority's right to acquire PKO's property arose when the Redevelopment Plan was adopted in 1998. Section 1-219.1 may not be applied retroactively to impair the Authority's right to acquire PKO's property.

B. Virginia Code § 1-219.1 does not discontinue this proceeding because it was not the law in effect on the date the Authority's right to acquire PKO's property accrued.

Another way of stating that new statutes may not be applied retroactively to impair substantive rights is to state that the law in effect when the Authority's right to acquire PKO's property accrued governs the proceeding. This is the meaning of § 1-239 of the Virginia Code:

> No new act of the General Assembly shall be construed to repeal a former law, as to . . . any right accrued, or claim arising under the former law, or in any way whatever to affect any such . . . right accrued, or claim arising before the new act of the General Assembly takes effect . . .

Id.; see also Garraghty v. Va. Dep't of Corrections, 52 F.3d 1274, 1281 (4th Cir. 1995) ("This statute or a predecessor has been the law of Virginia for more than 100 years and has long been held to apply to civil as well as criminal cases.") (citing *White's Adm'x v. Freeman,* 79 Va. 597 (1884)) (referring to VA. CODE § 1-16, the predecessor of § 1-239).

The Trial Court correctly held that this condemnation proceeding is governed by the law prior to § 1-219.1 taking effect. The Authority's right to acquire PKO's property arose in 1998. Virginia Code § 1-239 makes clear that the provisions of § 1-219.1 do not affect the Authority's right to acquire PKO's property by eminent domain because the Authority's rights accrued "before the new act of the General Assembly t[ook] effect." VA. CODE § 1-239.

C. No pending matter in Virginia may be discontinued as the result of the enactment of a new Code provision.

The third reason that § 1-219.1 cannot discontinue this proceeding is § 1-9. This statute prohibits the discontinuation of a pending action by the enactment of a new Code provision:

> Nothing in this Code shall operate to discontinue any cause or matter, civil or criminal, which shall be pending and undetermined in any court on the day before this Code or any provision of this Code, takes effect; every such cause and matter shall be proceeded in, tried and determined in such court, or in the court which succeeds to or has its jurisdiction . .

VA. CODE § 1-9 (emphasis added). This proceeding was pending when § 1-219.1 took effect on July 1, 2010. Therefore, § 1-219.1 may not discontinue the case.

Because § 1-9 prohibits the discontinuance of pending proceedings by new laws, if the General Assembly had intended for § 1-219.1 to operate

to discontinue pending proceedings, it would need to repeal § 1-9, at least as it applies to this new statute. Otherwise, the new law would violate § 1-9.

Furthermore, the General Assembly is deemed to have known of the existence of § 1-9 when it drafted Clause 3 of § 1-219.1. *School Board of Stonewall District v. Patterson,* 111 Va. 482, 487-488, 69 S.E. 337, 339 (1910). The General Assembly's knowledge of § 1-9 when it drafted § 1-219.1 indicates that it did not intend to discontinue condemnation cases pending before the effective date.

D. PKO is incorrect that the different language in Clause 3 and Clause 4 means that § 1-219.1 operates to discontinue this proceeding.

PKO sole argument in favor of applying § 1-219.1 retroactively is the General Assembly's use of the phrase "to acquire property" in Clause 3, as compared to its use of the phrase "provided such acquisitions are instituted" in clause 4 ("Clause 4"). PKO Brief, pp. 9-10. This argument is wrong for several reasons.

First, PKO's argument does not overcome (1) the prohibition against impairment of substantive rights by new statutes, (2) § 1-239 which provides that the law in effect upon accrual of the right governs the

proceedings, and (3) § 1-9's prohibition against a new law discontinuing pending proceedings.

Second, interpreting Clause 3 as requiring dismissal of the Authority's pending case does not make sense, as the Trial Court found. "Such a reading of Clause Three would lead to 'inconsistent, unpredictable and potentially unfair results—results in direct conflict with the purpose of delayed effective dates.'" Appx. 443-444 (February 17, 2011 Letter Opinion, at 8-9). As the Trial Court explained,

> For example, if a condemnation proceeding concerning non-blighted property within a properly established redevelopment area had been adjudicated in favor of a respondent landowner on June 30, 2010, NRHA would have no recourse to appeal even if reversible error had been committed by the trial court, as the July 1, 2010 effective date of the new statute would effectively preclude even a timely appeal.

Id. To avoid such inconsistent and unpredictable results, § 1-219.1 must be applied prospectively from its effective date of July 1, 2010.

Third, using Clause 4 to construe Clause 3 requires a finding that Clause 3 is ambiguous and must be construed. *See Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985) (if language is clear and unambiguous, there is no need for construction by the court). Clause 3 is not ambiguous: the plain meaning of Clause 3 is that the statute affects acquisitions, i.e. "takes effect", on July 1, 2010. Clause 3 does not say, nor

does it mean, that the Authority must complete litigation pertaining to such acquisitions by that date. If this were truly a "sunset" provision, as PKO argues, it would state that the Authority must take title to property no later than July 1, 2010. PKO may not use Clause 4 to attempt to create ambiguity in Clause 3. *See Brown*, 229 Va. at 321, 330 S.E.2d at 87 ("when an enactment is unambiguous, extrinsic legislative history may not be used to create an ambiguity, and then remove it, where none otherwise exists.").

Fourth, PKO cannot argue that § 1-219.1 became effective against the Authority's acquisitions under the Plan on July 1, 2007, because the statute only have only one effective date as it pertains to acquisitions by housing authorities. Section 1-214 provides that all laws shall take effect on the first day of July following the session in which they were enacted, *unless a subsequent date is specified*. VA. CODE, § 1-214 (emphasis supplied). Clause 3 specifies a different effective date for acquisitions by housing authorities under a plan confirmed prior to January 1, 2007: July 1, 2010. Contrary to PKO's argument that §1-219.1 becomes effective July 1, 2007, July 1, 2010 is the "subsequent date" referred to in § 1-214. On any particular date, as it pertains to the Authority's acquisition of PKO's

property, either the statute has taken effect or it has not. On April 21, 2010, it had not.

II. THE TRIAL COURT CORRECTLY APPLIED THE DOCTRINE OF *STARE DECISIS* IN DETERMINING THAT THE REDEVELOPMENT PLAN IS LAWFUL. (Assignments of Error 2 and 4)

Standard of Review

The application of the doctrine of *stare decisis* is a question of law. Questions of law are reviewed *de novo*. *See PMA Capital Ins. Co. v. US Airways, Inc.,* 271 Va. 352, 358, 626 S.E.2d 369, 372 (2006).

Discussion

The Trial Court determined that the Redevelopment Plan, and the acquisitions pursuant to the Plan, are lawful by applying the results of two prior sets of cases to this case by virtue of the doctrine of *stare decisis*. PKO contends that the Trial Court erred in applying *stare decisis* in this case, and also argues that the decisions in the 1999 and 2009 Cases were wrong. The decisions in those cases may not be attacked collaterally. The doctrine of *stare decisis* applies and precludes re-litigation of these previously decided cases. As a result, the Authority's acquisition of PKO's property is lawful under the Redevelopment Plan.

A. The Authority's adoption and implementation and execution of the Redevelopment Plan are presumed valid.

The Redevelopment Plan and the Authority's implementation of the Plan constitute legislative acts which are presumed to be valid. *Rudder v. Wise County Redevelopment and Housing Authority,* 219 Va. 592, 595, 249 S.E.2d 177, 178 (1978); *see also City of Charlottesville v. DeHaan,* 228 Va. 578, 583, 323 S.E.2d 131, 133 (1984) ("a legislative enactment must be sustained unless it is clearly arbitrary and unreasonable . . .") (internal citations omitted). Thus, the Authority's adoption and implementation of the Plan stand on a solid footing.

The Trial Court's rulings that the Plan and acquisitions under the Plan are lawful are also well grounded. The 2009 decision was based on a significant evidentiary record and extensive briefing. Evidence was presented over the course of a three day hearing, which included the testimony of expert and fact witnesses, numerous exhibits including the Redevelopment Plan, photographs of the project area, and an agreement between the Authority and Old Dominion University concerning a 4% reimbursement for administrative costs. Appx. 178-206 (July 23, 2009 Letter Opinion). The Trial Court carefully considered all of the evidence and drafted a comprehensive, 29 page opinion setting forth its holdings and

the evidentiary basis for its holdings. *Id.* The landowner in that case filed a Petition for Appeal, which was denied by this Court. Appx. 222.

B. The application of *stare decisis* is intended to achieve consistent outcomes for different parties subject to substantially similar facts.

The Trial Court applied its decisions overruling the challenges to the Redevelopment Plan from the 1999 and 2009 sets of cases to strike PKO's defenses and objections. Because the same Redevelopment Plan applies to the Authority's acquisition of PKO's property, the relevant facts in those cases are substantially the same as the relevant facts in this case. As a consequence, this case is ideally suited for application of *stare decisis*.

The doctrine of *stare decisis* is designed to achieve consistent outcomes for different litigants operating under a substantially same set of facts. Under *stare decisis*, "the principles of law as applicable to the state of facts . . . will apply in later cases where the facts are substantially the same, even though the parties are different." *Commercial Business Systems, Inc. v. Halifax Corporation, et. al.,* 253 Va. 292, 297, 484 S.E.2d 892, 894 (1997). "In Virginia, the doctrine of *stare decisis* is more than a mere cliché. That doctrine plays a significant role in the orderly administration of justice by assuring consistent, predictable, and balanced application of legal principles." *Selected Risks Ins. Co. v. Dean,* 233 Va.

260, 265, 355 S.E.2d 579, 581 (1987). *Stare decisis* is applicable by courts of coordinate jurisdiction, especially where a writ of error is denied by an appellate court, as is the case here. *Tate v. Hain,* 181 Va. 402, 415, 25 S.E.2d 321, 326 (1943); *see also Kelly v. Thomasson*, 48 Va. Cir. 100 (Jan. 29, 1999) (Roanoke Circuit Court applied *stare decisis* in following prior case it decided on substantially similar facts).

C. The Trial Court correctly applied *stare decisis* because the facts in this case are substantially the same as the facts in the 1999 and 2009 Cases.

The Trial Court correctly applied the doctrine of *stare decisis* because the facts in this case are substantially the same as the facts pertinent to the challenges made to the Redevelopment Plan in 1999 and 2009. All three sets of cases considered the facts pertaining to the *same* Redevelopment Plan and the *same* Project Area. Appx. 436-445 (*Norfolk Redevelopment and Housing Authority v. Central Radio, et. al.,* No. 10-2965, Letter Op., at 5 (Norfolk Cir. Ct. February 17, 2011) ("February 17, 2011 Letter Opinion"). There are no relevant distinctions between any of the property owners in the project area. Moreover, PKO made the same challenges in this case as the landowners in the 2009 case. Appx. 23-28.

The Redevelopment Plan affects over 150 properties within the Project Area. Appx. 106. It affects each of these properties in exactly the

same manner—they are to be acquired. Application of *stare decisis* ensures predictable results upon which the parties may rely. "Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne v. Tennessee,* 501 U.S. 808, 828 (1991). Without *stare decisis*, the Authority and landowners in the entire project area would potentially need to litigate each and every taking, possibly leading to divergent results upon substantially the same set of facts. This is exactly the outcome that *stare decisis* is designed to prevent.

PKO's argument that *stare decisis* should not be applied because it raised new arguments that were not raised in the previous cases is wrong. PKO Brief, pp. 16-17. The question of whether to apply *stare decisis* does not turn on what arguments were presented in the prior case; rather, s*tare decisis* is properly applied where the facts to which the question of law is to be applied are substantially the same as in the previous cases. *See Commercial Business Systems, Inc.,* 253 Va. at 297, 484 S.E.2d at 894. As the Trial Court found, the facts are substantially similar, therefore, it is proper to apply *stare decisis*.

D. This Court denied the landowner's Petition for Appeal in the 2009 Cases, stating that the Trial Court committed no reversible error.

Application of *stare decisis* is further justified because a landowner in the 2009 Cases appealed the Trial Court's decision overruling the objections and defenses to acquisition under the Redevelopment Plan and this Court denied the Petition for Appeal. Appx. 217-226. The landowner in that case contended, as PKO does here, that the project area was not blighted and the Redevelopment Plan was unlawful. One of the questions presented upon appeal bears directly upon *stare decisis*: "Was the trial court bound by the doctrine of *stare decisis* regarding a decision previously made by the Norfolk Circuit Court? (Assignment of Error 1)." Appx. 225. In denying the Petition for Appeal, this Court entered an order stating that the Trial Court committed no reversible error. Appx. 223.

E. PKO's argument that the Project Area is not blighted is precluded by *stare decisis*.

PKO's argument that the facts do not support the Trial Court's finding of blight in the Project Area is wrong for two reasons. First, the only question on appeal as to the determination of blight is whether the Trial Court correctly applied the doctrine of *stare decisis.* PKO may not re-litigate the 1999 and 2009 Cases, as *stare decisis* precludes such re-litigation. The

facts considered in the 1999 cases and the 2009 Cases are substantially the same as the facts here; therefore, the same legal result obtains.

Second, PKO defines blight much more narrowly than the law in effect in 1998 when the Plan was adopted. PKO argues that the presence of blight is determined merely by the percentage of structures in the area that are in poor condition. PKO Brief, pp. 12-13. PKO states that the factors supporting blight in the Redevelopment Plan "may be relevant in other contexts, but they are immaterial to blight analysis." *Id.*, p. 13.

This is not the law. Virginia Code § 36-49(1), as in effect when the Redevelopment Plan was adopted, defined blight as:

> areas (including slum areas) with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangements of design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other facts, are detrimental to the safety, health, morals or welfare of the community.

Id. This is a broad definition that is met squarely by the findings set forth in the Redevelopment Plan (Appx. 59-78) as well as the evidence received by the Trial Court in the 1999 and 2009 Cases.

PKO's argument relies almost exclusively on *Bristol Redevelopment & Housing Authority v. Denton*, 198 Va. 171, 93 S.E.2d 288 (1956). PKO Brief, p. 12. In *Denton,* the trial court found that 39% of the structures in a

redevelopment area were in “poor” condition and ultimately held that the redevelopment area was not blighted. *Id.,* 198 Va. at 180, 93 S.E.2d at 295. The Supreme Court affirmed. *Id.,* 198 Va. at 182, 93 S.E.2d at 296.

Denton is readily distinguished from the case at bar. The evidence in *Denton* focused almost exclusively on the condition of residential structures in the project area. *Id.,* 198 Va. at 180-182, 93 S.E.2d at 294-295. By contrast, in the instant case, there were many different factors that contributed to a finding of blight according to the definition in Virginia Code § 36-49(1). The Authority considered multiple factors specifically enumerated in this section and the “combination of these or other facts.” VA. CODE § 36-49(1); s*ee also* Redevelopment Plan, pp. 6-23 (Appx. 59-78) (finding high levels of poverty, incompatible land uses, problematic environmental conditions, poor public infrastructure, inadequate curbing, guttering and sidewalks, insufficient street lighting, declining number of homeowners and higher than average crime statistics in the Project Area). Moreover, PKO fails to address the extensive expert witness testimony and photographic evidence presented at the hearing in the 2009 Cases. Appx. 201-206.

There is no evidence in this record or in the records of the 1999 and 2009 Cases that would indicate that the prior rulings in the 1999 and 2009

Cases were invalid, even if *stare decisis* didn't preclude PKO from making such an argument.

F. The Trial Court held correctly that the status of the project area at the time the Petition was filed is irrelevant.

PKO is also incorrect that the project area must be blighted at the time the Authority filed its condemnation petition. PKO Brief, pp. 13-14. The condition of the Project Area at the time this condemnation petition was filed is irrelevant. Once the Authority determined the Project Area to be blighted, and the Redevelopment Plan was adopted, the Authority had the right to acquire all property within the Project Area in order to carry out comprehensive redevelopment of the entire area. VA. CODE § 36-49.

PKO's reliance on the decision in *C and C Real Estate* to support its argument is wrong. In *C and C Real Estate,* this Court invalidated an acquisition under a conservation plan, not a redevelopment plan. *Norfolk Redevelopment and Housing Authority v. C and C Real Estate, Inc.*, 272 Va. 2, 630 S.E. 2d 505 (2006). The purpose of a conservation plan is to revitalize an area by acquiring specific blighted properties. It has a narrow reach—if the specific property is no longer blighted, there is no longer a reason to acquire it. The purpose of a redevelopment plan is broader and entails revitalization of a blighted area by acquiring all properties within the project area and then redeveloping the area in a comprehensive manner.

VA. CODE § 36-49(1); *see also* July 23, 2009 Letter Opinion at 14-16 (Appx. 282-284). This Court recognized the difference and limited its rationale in the *C and C Real Estate* case to acquisitions under conservation plans. *C and C Real Estate*, 272 Va. at 11, 630 S.E.2d at 510.

If the Authority were prohibited from completing a redevelopment plan after achieving substantial progress towards eradicating blight, comprehensive redevelopment of the project area would never be attainable. This is not the law.

Moreover, PKO's argument that the condition of the project area must be continually evaluated would render § 36-49(1) and the other statutes permitting an orderly and comprehensive redevelopment of the entire project area unconstitutional. This is because the statute authorizes the Authority to acquire all of the property within the project area after the initial determination of blight is made. *See Hunter v. Norfolk Redevelopment and Housing Authority,* 195 Va. 326, 338, 78 S.E.2d 893, 900 (1953) (holding that redevelopment of blighted areas and acquisition of private property by power of eminent domain for such purpose is constitutional).

III. PKO's argument that the Authority was biased toward a finding of blight is precluded by *stare decisis* and is not supported by the facts. (Assignment of Error 3)

Standard of Review

The application of the doctrine of *stare decisis* is a question of law. Questions of law are reviewed *de novo*. *See PMA Capital Ins. Co. v. US Airways, Inc.,* 271 Va. 352, 358, 626 S.E.2d 369, 372 (2006).

Discussion

PKO's argument that the facts do not support the Trial Court's finding that the Authority was not biased is also wrong. Again, the only question on appeal is whether the Trial Court correctly applied the doctrine of *stare decisis*, as this issue was addressed in the 2009 Cases.

The Trial Court held in the 2009 Cases that "any private benefit arising from the Redevelopment Plan is merely 'incidental' to the stated public purpose of the elimination of blight in the area covered by the Redevelopment Plan." Appx. 288 (July 23, 2009 Letter Opinion at 20). Applying *stare decisis,* the Trial Court held that "[a]s NRHA's alleged financial interest in the condemnation proceedings is merely incidental to the stated public purpose of the elimination of blight and does not constitute a direct financial stake, PKO's due process defense fails under the doctrine of *stare decisis.*" Appx. 440 (February 17, 2011 Letter Opinion at 6). *See*

also Light v. City of Danville, 168 Va. 181, 196-197, 190 S.E. 276, 282 (1937) (intention of condemnor is established by the validity of what is to be done as shown in the record of the proceeding, not what is "hidden in the minds of the agency" performing the condemnations).

Because the Trial Court applied its decision in the 2009 Cases to PKO's argument, PKO may not re-litigate this issue and *stare decisis* applies.

Additionally, PKO's legal authority fails to support its argument that the Authority was inherently biased in determining that the Project Area was blighted. PKO's reliance on *Tumey v. Ohio,* 273 U.S. 510 (1927) and *Ward v. Village of Monroeville,* 409 U.S. 57 (1972) is without merit. In *Tumey,* the mayor, serving as the judge in a criminal case, was determined to be biased where his salary would be supplemented if he found the defendant guilty, but he would receive nothing if the defendant was acquitted. 273 U.S. at 522. Similarly, in *Ward*, the mayor, also sitting as judge, was found to be biased in deciding the criminal defendant's guilt or innocence where his city derived a significant portion of its revenue from the fines paid in connection with criminal convictions. 409 U.S. at 59.

The facts in these cases are not similar to the facts at issue in the case in bar. First, those cases involve tying judicial compensation or

benefits to the judge's employer directly to imposition of sentences in criminal matters. The rulings in these cases do not reach beyond their facts. *See Marshall v. Jerrico, Inc.,* 446 U.S. 238, 243 (1980) (declining to expand the strict requirements of *Tumey* and *Ward* to cases where the decision maker was not a judge).

Second, PKO's argument that the Authority received a "generous commission" ignores the administrative expenses associated with research, creation, adoption and execution of the Redevelopment Plan. Appx. 263. The fee constitutes reimbursement for administrative costs in administering the Redevelopment Plan, nothing more. *Id*.

PKO's argument that Authority's finding of blight should be examined with heightened scrutiny because it is a "quasi-judicial" function, citing *Taylor v. Arlington County Bd.,* 189 Va. 472, 53 S.E.2d 34, (1949), is also without merit. In *Taylor*, this Court held that quasi-judicial functions, when based upon a fair and honest exercise of discretion, will not be interfered with by the courts, even if erroneous. *Id.,* 189 Va. at 483, 53 S.E.2d at 39.

Finally, there is no evidence in any of the litigation involving the Plan that the administrative fee had any impact upon decisions affecting landowners' properties whatsoever.

STATEMENT OF RELIEF SOUGHT

The Trial Court held correctly that the law prior to § 1-219.1 taking effect governs this proceeding and that this statute may not be applied retroactively to discontinue this proceeding. Furthermore, the Trial Court's application of *stare decisis* to the lawfulness of the Redevelopment Plan and the acquisition of the PKO's property was correct. Accordingly, the Authority respectfully requests that this Court affirm the Trial Court's decision striking PKO's objections and defenses to acquisition of its property.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing complies with Rules 5:28, and further certifies as follows:

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On this the **2nd** day of April, 2013, fifteen copies of the foregoing Brief, and a copy on CD, have been hand delivered to the Clerk of this Court. This same date, three copies of the same, and a copy on CD, have been served on opposing counsel via third party commercial carrier at the addresses provided above.

Counsel for the Appellee